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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ELNATHAN WASHINGTON, Defendant and Appellant.	B217457 (Los Angeles County Super. Ct. No. MA043769)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Affirmed and remanded for resentencing.

Law Offices of James Koester and James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, and Michael C. Keller and Douglas L. Wilson, Deputies Attorney General, for Plaintiff and Respondent.

Appellant Elnathan Washington appeals his conviction for one count of offering false evidence (Pen. Code,[1] § 132) and one count of preparing false documentary evidence (§ 134). On appeal, Washington contends that the prosecution improperly exercised its three of its seven peremptory challenges to excuse African-American prospective jurors in violation of *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). Washington also claims that the trial court erred in failing to strike two prior prison term sentencing enhancements pursuant to section 667.5, subdivision (b). We conclude that the matter must be remanded to the trial court to correct certain sentencing errors consistent with the parties' sentencing agreement, but otherwise affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

On February 5, 2009, the Los Angeles County District Attorney charged Washington with one count of offering false evidence (§ 132), and one count of preparing false documentary evidence (§ 134). It was alleged that, at the time of the commission of the charged offenses, Washington was released on bail in two other criminal cases within the meaning of section 12022.1. It also was alleged that Washington had suffered one prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served two prior prison terms within the meaning of section 667.5, subdivision (b). Washington pled not guilty to the underlying counts. In a separate proceeding held shortly before trial, Washington admitted each of the sentencing enhancement allegations.

II. The Evidence at Trial

On October 15, 2008, Washington appeared in Los Angeles County Superior Court for a hearing in a separate criminal case. At the time of the hearing, Washington was out on bail and was represented by retained counsel, Richard Barnwell. Shortly

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[1] All further statutory references are to the Penal Code.

before the start of the hearing, Washington was seen mingling with his girlfriend, Dalerena Dennis, in the hallway of the courthouse and in the back of the courtroom. Four other female friends of Washington were also in attendance and were seated in the courtroom audience.

Once the hearing commenced, Barnwell advised the trial court that Washington was asking for a continuance of the trial date. While addressing the court, Barnwell was handed an alleged doctor's note by one of Washington's female friends. Barnwell could not recall the identity of the woman who handed him the note; however, the district attorney investigator on the case, Clifford Auldridge, was present at the hearing and observed that the woman was Dennis. After a brief sotto voce conference with Washington, Barnwell stated on the record that he had just received some paperwork from his client that he needed to review with him, but that it was his understanding that Washington was about to have back surgery. The court granted a brief recess during which Barnwell and the deputy district attorney conferred about a three-month continuance due to Washington's medical condition. Once back on the record, with Washington standing beside him, Barnwell represented to the court that Washington was scheduled for surgery the following week on October 21, 2008, and that, based on his medical condition, Washington was seeking a continuance of the trial date to January 20, 2009. Barnwell did not show the alleged doctor's note to Washington during the hearing, but rather submitted it to the trial court in support of the request. The trial court granted the continuance.

The doctor's note provided to the trial court indicated that Washington had attended a medical appointment with Dr. Steven Lawenda the previous day, October 14, 2008. According to the note, Dr. Lawenda ordered an MRI for Washington's lower back at the L7 and L8 vertebrae, and referred Washington to an orthopedic specialist and a physical therapist for treatment following surgery. The note also reflected that surgery was scheduled for October 21, 2008, pending the results of the MRI. At trial, Dr. Lawenda, a family physician, testified that the note appeared to be a forgery. Dr. Lawenda did not see Washington on October 14, 2008, nor did he order surgery for

Washington on any date. Dr. Lawenda saw Washington once on September 22, 2008, for lower back and shoulder pain, and referred him to an orthopedic specialist at that time. According to Dr. Lawenda, his office never generated the October 14, 2008 doctor's note. The note itself also reflected several misspellings and an erroneous reference to vertebrae that do not exist.

In an October 17, 2008 interview with Investigator Auldridge, Washington indicated that Dennis had told him he would need a doctor's note to continue his trial date and that Dennis had obtained the note for him from the doctor's office. Washington asserted that he did not know the name of the doctor who provided the note because Dennis arranged all of his medical appointments and picked up the note herself. Washington also recounted that he was scheduled for surgery pending the results of an upcoming MRI. In a separate interview with Investigator Auldridge, Dennis stated that Washington had an appointment with Dr. Lawenda on October 14, 2008, and inadvertently left a document with after-care instructions at the doctor's office. Dennis obtained the document from Dr. Lawenda's office later that night. Dennis also told the investigators that the document showed that Washington was in fact scheduled for lower back surgery on October 21, 2008. At trial, Dennis denied that she handed a doctor's note to Washington's attorney at the October 15, 2008 hearing. Dennis also denied telling the district attorney investigators that Washington had attended an October 14, 2008 appointment with Dr. Lawenda. According to Dennis, Washington could neither read nor write very well.

III. Verdict and Sentencing

At the conclusion of the trial, the jury found Washington guilty on all counts. On June 17, 2009, the trial court held a sentencing hearing in this case (Case No. MA043769) and in two other cases pending against Washington (Case Nos. MA039535 and MA043794). In exchange for Washington's no contest plea to certain charges in Case No. MA043794, the parties agreed to a "global settlement"

encompassing all three cases.[2] The trial court sentenced Washington to three years on the offering false evidence count and to eight months on the presenting false documentary evidence count, each of which was doubled pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court also imposed a two-year consecutive term pursuant to the out-on-bail enhancement (§ 12022.1), but neither imposed nor struck the two prior prison term enhancements (§ 667.5, subd. (b)). Washington's aggregate sentence in all three cases was 15 years and four months. On July 7, 2009, Washington filed a timely notice of appeal.

DISCUSSION

Washington raises two arguments on appeal. First, he contends that the prosecution improperly exercised its peremptory challenges to excuse three African-American prospective jurors from the panel in violation of his federal and state constitutional rights. Second, he claims that, at the sentencing hearing, the trial court erroneously failed to strike his prior prison term enhancements pursuant to the parties' global sentencing agreement. We address each argument in turn.

I. Peremptory Challenges

A. Relevant Proceedings

The jury pool called for Washington's trial consisted of 35 prospective jurors, including seven African-Americans. At the start of jury selection, a panel of 23 prospective jurors was seated in the jury box and subjected to voir dire. Three prospective jurors were excused for cause, and each side exercised a first peremptory challenge. With its second peremptory challenge, the prosecution excused Juror No. 8461, an African-American man who was seated as Prospective Juror No. 6. At that

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[2] In Case No. MA039535, Washington previously had pled guilty to two counts of possession of a firearm by a felon (§ 12021, subd. (a)(1)) and possession of ammunition (§ 12316, subd. (b)(1)). In Case No. MA043794, Washington agreed to plead no contest to two of nine counts of grand theft of personal property (§ 487, subd. (a)), and to admit the allegation that the crimes involved a pattern of felony conduct (§ 186.11, subd. (a)).

time, there were four other African-Americans seated as Prospective Jurors Nos. 4, 8, 11, and 22. The prosecution thereafter accepted the jury panel three times. Following a fifth peremptory challenge by the defense, Juror No. 1091, an African-American woman, was moved from the 22nd to the seventh seat in the jury box. The prosecution then exercised its third peremptory challenge to excuse Juror No. 1091. At that time, there were three other African-Americans seated as Prospective Jurors Nos. 4, 8, and 11.

The remaining 12 prospective jurors seated in the audience were called to the jury box for voir dire. Each side then exercised additional peremptory challenges, including a defense challenge to Juror No. 7920, an African-American woman. In exercising its seventh peremptory challenge, the prosecution excused Juror No. 9159, an African-American woman who was seated as Prospective Juror No. 8. At that time, there were three other African-Americans seated as Prospective Jurors Nos. 4, 11, and 21. Following the prosecution's dismissal of Juror No. 9159, defense counsel made a *Wheeler* motion on the ground that the prosecution had exercised three of its seven peremptory challenges to excuse African-Americans. In response to the trial court's statement that it "need[ed] more than numbers" to find a prima facie case of discrimination, defense counsel argued that the prosecution had no valid basis for removing the three African-American prospective jurors because there was nothing objectionable about any of them.

The trial court found that the defense had failed to state a prima facie case. In setting forth the basis for its ruling, the court reasoned that Juror No. 8461 was a young, single, and childless man with limited life experience, that Juror No. 1091 had several ex-boyfriends who were members of law enforcement and a son who had been arrested for domestic violence, and that Juror No. 9159 worked in alternative education with at-risk children and also had a son with a prior domestic violence arrest. In addition, the court remarked that there were three other African-American prospective jurors who remained. Although the court found that a prima facie showing of race discrimination had not been made, it permitted the prosecution to explain its reasons for excusing each of the challenged jurors solely for the purpose of preserving the record. The prosecution

essentially reiterated the same race-neutral reasons expressed by the trial court in finding that there was no prima facie case.

Immediately following the denial of the *Wheeler* motion, both the prosecution and the defense accepted the jury panel and also stipulated to three alternate jurors. The empanelled jury included two African-American jurors (Juror Nos. 4 and 11) and one African-American alternate (Juror No. 21).

B. Applicable Law

It is well-established that the exercise of peremptory challenges to remove prospective jurors on the sole ground of group bias violates both the California and the United States Constitutions. (*People v. Ward* (2005) 36 Cal.4th 186, 200, citing *Wheeler*, *supra*, 22 Cal.3d at pp. 276-277 and *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*).) "When a defendant moves at trial to challenge the prosecution's use of peremptory strikes, the following procedures and standards apply. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination." [Citation.]' [Citations.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 469.)

To state a prima facie case of discrimination, the defendant must (1) raise the issue in a timely fashion, (2) make as complete a record as feasible, (3) establish that the persons excluded are members of a cognizable class, and (4) produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred. (*People v. Gray* (2005) 37 Cal.4th 168, 186.) "'An "inference" is generally understood to be a "conclusion reached by considering other facts and deducing a logical consequence from them."' [Citation.]" (*Ibid*.) "When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. [Citation.]" (*People v. Davenport* (1995) 11 Cal.4th 1171,

1200.) "'If the record "suggests grounds upon which the prosecutor might reasonably have challenged" the jurors in question, we affirm.' [Citations.]" (*Ibid*.)

Once a defendant has established a prima facie case, the burden shifts to the prosecutor to provide group-neutral reasons for each challenge. The prosecutor "need only offer a genuine, reasonably specific, race- or group-neutral explanation related to the particular case being tried. [Citations.] The justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice. [Citations.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136.) "'We review a trial court's determination regarding the sufficiency of a prosecutor's justifications for exercising peremptory challenges "'with great restraint.'" [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citations.]'" (*People v. Lenix* (2008) 44 Cal.4th 602, 613-614, fn. omitted.) The trial court's ruling on a *Wheeler* motion is thus reviewed "deferentially, considering only whether substantial evidence supports its conclusions." (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

C. The Trial Court Properly Found That There Was No Prima Facie Case

Washington argues that he satisfied his burden of establishing a prima facie case of race discrimination simply by demonstrating that the prosecution exercised three of its seven peremptory challenges to excuse African-Americans from the jury. In support of his argument, he points to statistical data showing that, while the percentage of African-Americans in the jury pool was 20 percent (seven of 35), the prosecution used 42.9 percent (three of seven) of its peremptory challenges against African-American prospective jurors. Washington reasons that this statistical disparity alone raised an inference of discriminatory purpose sufficient to state a prima facie case. We disagree.

It is true that a prima facie showing of discrimination does not depend on the number of prospective jurors challenged (*People v. Moss* (1986) 188 Cal.App.3d 268, 277), since "[t]he exclusion by peremptory challenge of a single juror on the basis of race

or ethnicity is an error of constitutional magnitude requiring reversal." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) However, the requisite showing is not made merely by establishing that an excluded juror was a member of a cognizable group. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 343; *People v. Howard* (2008) 42 Cal.4th 1000, 1018; *People v. Bell* (2007) 40 Cal.4th 582, 598.) Rather, "in drawing an inference of discrimination from the fact one party has excused 'most or all' members of a cognizable group [citation], a court finding a prima facie case is necessarily relying on an apparent pattern in the party's challenges." (*People v. Bell*, *supra*, at p. 598, fn. 3.) "Such a pattern will be difficult to discern when the number of challenges is extremely small." (*People v. Bonilla*, *supra*, at p. 343, fn. 12.)

In *People v. Bonilla*, for instance, the prosecutor struck the only two African-Americans in a 78-person jury pool. (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 342.) The California Supreme Court concluded that "'the small absolute size of this sample makes drawing an inference of discrimination from this fact alone impossible.'" (*Id*. at p. 343.) As the Court explained, """the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a pattern of impermissible exclusion."' [Citations.]" (*Ibid*., fn. omitted; see also *People v. Howard*, *supra*, 42 Cal.4th at p. 1018, fn. 10 ["The challenge of one or two jurors, standing alone, can rarely suggest a pattern of impermissible exclusion."]; *People v. Bell*, *supra*, 40 Cal.4th 582 at p. 598, fn. 3 ["Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, . . . to make a prima facie case after the excusal of only one or two members of a group is very difficult."].)

While Washington contends that the use of three of seven peremptory challenges against African-American prospective jurors is, in and of itself, sufficient to show a discriminatory pattern, the California Supreme Court repeatedly has rejected *Wheeler* claims based on similar statistical analyses. In *People v. Farnam* (2002) 28 Cal.4th 107, for example, the defendant sought to establish a prima facie case solely on the grounds that four of the first five peremptory challenges exercised by the prosecution were against

Black jurors and a very small minority of jurors on the panel were Black. (*Id*. at p. 136.) The Supreme Court concluded that the statistical disparities cited by the defendant "fall short of a prima facie showing." (*Id*. at p. 137.) Similarly, in *People v. Hoyas* (2007) 41 Cal.4th 872, the defendant claimed that the prosecution's use of peremptory challenges to strike three of the only four Hispanics on the jury panel was alone sufficient to demonstrate a prima facie case. (*Id*. at p. 901.) The Supreme Court rejected the argument, reasoning that "although a prosecutor's excusal of all members of a particular group may establish a prima facie discrimination case, especially if the defendant belongs to the same group, this fact alone is not conclusive." (*Ibid*.; see also *People v. Lancaster* (2007) 41 Cal.4th 50, 76 [trial court properly found prosecution's peremptory challenges to three of seven African-American female jurors "had not reached a level that suggested an inference of discrimination"]; *People v. Gray*, *supra*, 37 Cal.4th at p. 188 [prosecution's use of peremptory challenges to strike two of six African-American jurors "failed to raise a reasonable inference of discrimination"]; *People v. Young* (2005) 34 Cal.4th 1149, 1172, fn. 7 [defendant failed to make a prima facie showing based on prosecution's excusal of all three African-American female jurors because "[n]othing in *Wheeler* suggests that the removal of all members of a cognizable group, standing alone, is dispositive on the question of whether defendant has established a prima facie case"]; *People v. Davenport*, *supra*, 11 Cal.4th at p. 1201 ["[T]he only basis for establishing a prima facie case cited by defense counsel was that three of the six challenged prospective jurors had Hispanic surnames. This is insufficient."].

The statistical data cited by Washington also fail to provide a complete picture of the jury selection process in this case. Significantly, Washington ignores the fact that, several times during the selection process, the prosecution accepted a panel that included African-American jurors. (*People v. Lenix*, *supra*, 44 Cal.4th at p. 629 ["prosecutor's acceptance of the panel containing a Black juror strongly suggests that race was not a motive in his challenge"]; *People v. Gray*, *supra*, 37 Cal.4th at pp. 187-188 ["the exclusion of two African-American jurors and the retention of two failed to raise an inference of racial discrimination"].) Indeed, following its first challenge to an African-

American prospective juror (Juror No. 8461), the prosecution agreed on three separate occasions to a jury panel that contained three other African-Americans. At the time of the prosecution's second challenge to an African-American prospective juror (Juror No. 1091), three African-American jurors were still on the panel. When the prosecution used its third and final challenge against an African-American prospective juror (Juror No. 9159), there were two African-Americans on the panel and one African-American in the venire.

Given Washington's assertion that the statistical evidence alone was sufficient to establish a prima facie case, we also may consider the final composition of the jury in evaluating the merits of his claim. (*People v. Bonilla*, *supra*, 41 Cal.4th at pp. 345-346 [where defendant rested his prima facie case solely on statistical analysis of prosecution's challenges, it was proper for reviewing court to consider whether ultimate composition of jury supported inference of discriminatory intent].) Here, the final panel of 12 jurors and three alternates included two African-American jurors and one African-American alternate. The ultimate composition of the jury with alternates (three of 15, or 20 percent African-American) thus mirrored the composition of the original jury pool (seven of 35, or 20 percent African-American). (*Id.* at p. 346 [no prima facie showing of gender bias where "the ultimate composition of the jury (42 percent women) mirrored that of the juror pool (38 percent women)"]. Under these circumstances, the statistical evidence that the prosecution's exercised three of its seven peremptory challenges against African-American jurors was not sufficient, standing alone, to establish a prima facie case.

Moreover, the juror responses elicited during voir dire demonstrated race-neutral reasons for each of the prosecution's contested peremptory challenges. Juror No. 8461 was a single warehouse worker with no children and no prior jury service. The trial court commented that he appeared to be "very young" with "limited life experience." As the California Supreme Court has explained, a prospective juror's youth and corresponding lack of life experience can be a valid race-neutral reason for exercising a peremptory challenge. (See, e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 575 ["A potential juror's youth and apparent immaturity are race-neutral reasons that can support a peremptory

challenge."]; *People v. Taylor* (2010) 48 Cal.4th 574, 616 [record disclosed race-neutral reasons for striking prospective juror where "she was single and very young, and had not registered to vote"]; *People v. Salcido* (2008) 44 Cal.4th 93, 140 [prospective juror's "relative youth and related immaturity were reasonable grounds for her excusal"].)

Juror No. 1091 was an unmarried woman with four children. One of her sons had been arrested for domestic violence. She also had a few failed relationships with members of the Los Angeles Police Department. Our Supreme Court has "'repeatedly upheld peremptory challenges made on the basis of a prospective juror's negative experience with law enforcement.'" (*People v. Lenix*, *supra*, 44 Cal.4th at p. 628; see also *People v. Panah* (2005) 35 Cal.4th 395, 442; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1124.) Similarly, "a prosecutor may reasonably surmise that a close relative's adversary contact with the criminal justice system might make a prospective juror unsympathetic to the prosecution." (*People v. Farnam*, *supra*, 28 Cal.4th at p. 138.) Therefore, "the use of peremptory challenges to exclude prospective jurors whose . . . family members have had negative experiences with the criminal justice system is not unconstitutional." (*People v. Douglas* (1995) 36 Cal.App.4th 1681, 1690; see also *People v. Bonilla*, *supra*, 41 Cal.4th at p. 343 [no prima facie case shown where prosecutor excused prospective juror whose husband and father had suffered prior felony convictions]; *People v. Gray*, *supra*, 37 Cal.4th at p. 192 [no prima facie case shown where prosecutor challenged prospective juror who reported that someone close to her had been incarcerated].)

Juror No. 9159 also had a son with a prior arrest for domestic violence. Additionally, she was employed as an alternative education teacher working with at-risk youth. Because some of her students were on probation, she had ongoing contact with probation officers about their progress and previously had testified in court proceedings on their behalf. Juror No. 9159's profession was a sufficient race-neutral reason for the peremptory challenge because the prosecution reasonably could have believed that she would be overly sympathetic to the defense. (See, e.g., *People v. Watson* (2008) 43 Cal.4th 652, 677 [prospective juror's background in social work was proper race-neutral

reason for prosecution's peremptory challenge]; *People v. Reynoso* (2003) 31 Cal.4th 903, 923, fn. 5 [prosecution had valid race-neutral reason for removing prospective juror who was counselor for at-risk youth]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [educational background in psychology and employment in youth services agency were legitimate race-neutral explanations for prospective juror's excusal].) Accordingly, based on the record of voir dire before the trial court, there was substantial evidence to support its finding that Washington had failed to establish a prima facie case.

Washington asserts that the trial court misapplied the three-step analysis of the *Batson/Wheeler* inquiry by speculating as to possible race-neutral reasons for the contested peremptory challenges rather than requiring the prosecution to state its actual reasons on the record. However, the California Supreme Court has rejected the argument that Washington raises here. (*People v. Lancaster*, *supra*, 41 Cal.4th at pp. 75-76; *People v. Cornwell* (2005) 37 Cal.4th 50, 73-74, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In *Lancaster*, the defendant claimed that the trial court erred in finding that a prima facie case of discrimination had not been made because the court "was required to seek reasons from the prosecutor for the peremptory challenges at issue, rather than offering its own explanations." (*People v. Lancaster*, *supra*, at p. 75.) Like Washington, the defendant cited to the following language in *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*) to support his contention: "'The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. [Citation.] The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.'" (*People v. Lancaster*, *supra*, at p. 75, quoting *Johnson*, *supra*, 545 U.S. at p. 172.).)

The California Supreme Court concluded that the defendant's reliance on this passage in *Johnson* was misplaced. (*People v. Lancaster*, *supra*, 41 Cal.4th at p. 76.) As the Court explained, *Johnson* "was discussing the considerations applicable at the third step of the *Batson* inquiry, *after* a prima facie case has been established. '"It is not until

the third step that the persuasiveness of the justification becomes relevant – the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination."' [Citations.]" (*Ibid.*) The Court recognized that "'[o]nce the trial court concludes that the defendant has produced evidence raising an inference of discrimination, the court should not speculate as to the prosecutor's reasons – it should inquire of the prosecutor, as the high court directed. But there still is a first step to be taken by the defendant, namely producing evidence from which the trial court may infer "that discrimination has occurred."'" (*Ibid.*, quoting *People v. Cornwell*, *supra*, 37 Cal.4th at pp. 73-74.) The trial court therefore was not precluded from considering plausible race-neutral reasons for the prosecution's peremptory challenges in finding that there was no prima facie case. (*Id*. at pp. 76-78; see also *People v. Cornwell*, *supra*, at p. 73 [rejecting defendant's argument that trial court impermissibly speculated as to reasons for prosecution's peremptory challenge at first stage of the *Batson*/*Wheeler* inquiry because defendant had burden of "'producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred'"]; *People v. Phillips* (2007) 147 Cal.App.4th 810, 818 [trial court's review of prospective juror's voir dire responses was "not offered in substitution of the prosecution's explanation for exercise of its peremptory challenge; no explanation was required from the prosecution because the court had not then found a prima facie case"].)

In this case, the trial court made clear that it was denying the *Wheeler* motion based on its finding that Washington had failed to demonstrate a prima facie case of discrimination. At this first stage of the *Batson*/*Wheeler* inquiry, the burden was on Washington to set forth sufficient evidence from which the trial court could draw an inference that discrimination had occurred. In deciding whether Washington satisfied that prima facie burden, it was not improper for the trial court to consider the prospective jurors' responses and demeanor in voir dire to determine whether there were plausible race-neutral explanations for their exclusion. In so doing, the trial court was not substituting its own race-neutral reasons for those of the prosecution, but was simply articulating on the record why it found that there was no prima facie case. Because the

trial court properly concluded that a prima facie showing of discrimination had not been made based on the record before it, the court was not required to engage in a third-stage *Batson*/*Wheeler* analysis or to make findings related to the credibility of the prosecution's proffered reasons for excusing the challenged jurors. Consequently, the trial court did not err in denying Washington's *Wheeler* motion.

II. Sentencing Errors

Washington contends, and the Attorney General concedes, that the trial court committed a sentencing error when it failed to either impose or strike two prior prison term enhancements pursuant to section 667.5, subdivision (b). As discussed, shortly before trial, Washington admitted each of the sentencing enhancement allegations charged against him, including the allegation that he had served two prior prison terms within the meaning of section 667.5, subdivision (b). Pursuant to a global sentencing agreement between the parties, the trial court sentenced Washington in three separate criminal cases, including the instant case, to an aggregate term of 15 years and four months. In imposing the sentence in this case, the trial court doubled each of the terms on the underlying counts based on the "Three Strikes" law enhancements (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and added a two-year consecutive term based on the out-on-bail enhancement (§ 12022.1). However, the court neither imposed nor struck the two prior prison term enhancements (§ 667.5, subd. (b)).

Once a prior prison term enhancement has been admitted or found true within the meaning of section 667.5, subdivision (b), the trial court must either impose or strike the enhancement. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["the trial court may not stay the one-year enhancement, which is mandatory unless stricken"]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 311 ["the court must either impose the prior prison enhancements or strike them"].) If the trial court exercises its discretion to strike the enhancement, it must also set forth its reasons for doing so. (§ 1385, subd. (a); see also *People v. Jordan* (2003) 108 Cal.App.4th 349, 368 ["a statement of reasons in the record must accompany the exercise of the great power to strike" a prior prison term enhancement]; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391 ["If a trial judge

exercises the power to strike pursuant to section 1385, subdivision (a), the reasons for the exercise of discretion must be set forth in writing in the minutes."].) "The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. [Citations.]" (*People v. Bradley*, *supra*, at p. 391.)

Here, the parties agree that the matter must be remanded to the trial court for resentencing on the two prior prison term enhancements. Washington also argues that the trial court must be ordered to strike the enhancements on remand because the parties' global sentencing agreement did not contemplate that Washington would serve any additional prison time beyond the 15 year and four month aggregate term. However, the record is silent with respect to either the parties' or the trial court's intent to strike the prior prison term enhancements as part of the sentencing agreement. There was simply no mention of these specific enhancements at the sentencing hearing or in the clerk's minute order. Accordingly, we cannot tell from the record before us whether the parties actually contemplated that the enhancements would be stricken, or simply failed to consider them in reaching their sentencing agreement.

Faced with such silence, we will not assume that the trial court intended to strike each prior prison term enhancement when it sentenced Washington in the instant case. Rather, we must remand the matter to the trial court with directions that the court, in accordance with the terms of the parties' global sentencing agreement, either impose the prior prison term enhancements pursuant to section 667.5, subdivision (b), or strike the enhancements, with stated reasons for doing so, pursuant to section 1385, subdivision (a). (*People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1041 ["Since the court's failure . . . to impose or strike the prison term prior created a sentence that was not legally authorized, . . . [o]ur duty is to remand for the exercise of the court's discretion in compliance with the statutory mandate."]; *People v. Bradley*, *supra*, 64 Cal.App.4th at p. 390 [where the trial court fails to either impose or strike a prior prison term enhancement, "remand is appropriate for the trial court to exercise discretion pursuant to section 1385, subdivision (a)"].)

Although not addressed by either party, there is an additional sentencing error that must be corrected by the trial court on remand. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [unauthorized sentence may be corrected at any time regardless of whether an objection was raised in the trial court or reviewing court].) In Case No. MA043794, the trial court sentenced Washington to consecutive terms of one year and four months on the two counts of grand theft of personal property, each of which was calculated as one-third of the middle term, or eight months, doubled pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court also imposed a two-year consecutive term on the white collar crime enhancement pursuant to section 186.11.[3] However, because the white collar crime enhancement was imposed for a subordinate term, it should have been calculated as one-third of the statutory term required by section 186.11, or eight months, rather than the full two-year term. (§ 1170.1, subd. (a) ["The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed . . ., and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."].) Therefore, on remand, the trial court must also correct the sentence on the white collar crime enhancement to impose a consecutive term of eight months pursuant to section 186.11, subdivision (a)(3).

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[3] As part of his plea in Case No. MA043794, Washington stipulated that the total amount of restitution owed was $187,000. Under section 186.11, subdivision (a)(3), if the amount taken is more than $100,000 but less than $500,000, the enhancement shall be the term specified in section 12022.6, subdivision (a). Prior to January 1, 2008, section 12022.6, subdivision (a)(2) provided for a two-year enhancement where the amount taken exceeded $150,000. Effective January 1, 2008, the statute was amended to increase the threshold amount on the two-year enhancement to $200,000. (Stats. 2007, ch. 420, § 1.) However, in amending section 12022.6, the Legislature specified that its intent was that such amendments shall "apply prospectively only and shall not be interpreted to benefit any defendant who committed any crime or received any sentence before the effective date of this act." (Stats. 2007, ch. 420, § 2.) Because the abstract of judgment in Case No. MA043794 reflects that Washington committed the charged crimes in 2006, the prior version of section 12022.6, subdivision (a)(2), with its two-year enhancement for a theft exceeding $150,000, applied to Washington's sentence.

DISPOSITION

The matter is remanded to the trial court with the following directions: (1) in Case No. MA043769, the court shall either impose the two prior prison term enhancements pursuant to section 667.5, subdivision (b), or strike the enhancements pursuant to section 1385, subdivision (a). The sentence must be consistent with the terms of the parties' sentencing agreement and (2) in Case No. MA043794, the court shall impose a consecutive term of eight months on the white collar crime enhancement pursuant to section 186.11, subdivision (a)(3) rather than a two-year term. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.